Nos. 80-5049 & 80-54

IN THE

Supreme Court of the United States

October Term, 1980

CLIFFORD E. CLAYTON,

Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AND ITS LOCAL 509,

Respondents.

ITT GILFILLAN,

Petitioner,

v.

CLIFFORD E. CLAYTON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of the respondents in this case.

INTEREST OF THE AFL-CIO

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 104 national and international labor organizations representing approximately 13,500,000 employees throughout the United States. The issues in this case are whether an individual who files a hybrid "§ 301 and breach of duty suit" (*Vaca* v. *Sipes,* 386 U.S. 171, 197 n.8) against his union and his employer must exhaust any internal union proceedings designed to correct errors in grievance handling before doing so and, if he must, whether the suit against the employer as well as the union is to be dismissed if he fails to do so. As such, this case concerns a situation at the cross section of several strains of the national labor policy, and is therefore of great importance to the AFL-CIO. For, questions concerning the scope to be given to the grievance-settling mechanism devised by parties to a collective bargaining agreement are involved, as are issues relating to the union's duty fairly to process grievances on behalf of its members, and problems concerning the ability of courts to foster internal union dispute resolution procedures by requiring the use of such procedures when reasonable. It is because of the importance of this case to a variety of problems encountered by labor organizations that the AFL-CIO seeks this opportunity to present its views to the Court.

ISSUES TO BE COVERED

The very complexity of the issues in this case creates a tendency to assume the answers to or give brief analysis of questions which, while perhaps not at center stage in this case, are of great significance to the development of national labor policy generally. These questions should be treated fully by this Court if it becomes necessary to address them as stepping stones to its decision. The brief,

consequently, is not primarily addressed to the outcome of the particular dispute. Rather, we analyze three underlying questions which, should the Court find the need to address them, deserve more careful attention than they may otherwise receive. The questions, and our suggestions as to their resolution, are:

First, whether issues concerning the breach of the statutory duty of fair representation can properly be said to arise at all where a union has not made a final determination whether to pursue grievance-arbitration procedures upon a particular employee's behalf, and the arbitrator chosen by the employer and the union to administer the collective agreement has not determined whether, if the union does pursue the grievance, the agreement provides for or precludes arbitration.

Upon this question, it is our view that the court below much too quickly bypassed the possibility that principles covering the exhaustion of *contractual grievance* remedies, as opposed to *internal union* remedies, govern this case. *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, read in light of the holding in *Wiley* v. *Livingston,* 376 U.S. 543, that procedural as well as substantive issues should usually be left to the arbitrator, requires, in our view, the result reached below with respect to the union, without reference to any separate analysis concerning exhaustion of internal union procedures.

Second, whether § 101(a)(4) of the LMRDA has any application to this case, either affirmatively, by authorizing court-required exhaustion of a union's system for determining whether a preliminary grievance-handling decision was correct, or negatively, by limiting such authorization to a four-month period.

As we explain, the language and history of § 101(a)(4), as well as relevant policy considerations, suggest that the sec-

tion does not concern the discretion of courts to defer the internal proceedings but, rather, whether *unions* can enforce limitations upon resort to legal remedies. While *Marine Workers* v. *NLRB*, 397 U.S. 418, has within it a passage contrary to this conclusion, that passage was not necessary to the Court's result in that case and should, if the question becomes pertinent, be disavowed.

Third, whether this Court's prior explication of the interaction between suits against unions for breach of the duty of fair representation and suits against employers for breach of a collective agreement under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, requires that employees must have an ongoing breach of duty of fair representation lawsuit against their union in order to litigate their breach of contract claim against the employer.

On this question, *Czosek* v. *O'Mara*, 397 U.S. 25 appears to us to be dispositive. The same factors which led to the conclusion in that case that an action similar to this one may be maintained against the union but not the employer dictate the same result as well in the contrary situation.

CONCLUSION

For the above stated reasons this motion for leave to file a brief amicus curiae should be granted.

Respectfully submitted.

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent upon the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

The instant case, a hybrid "§ 301 and breach of duty suit" (*Vaca* v. *Sipes,* 386 U.S. 171, 197 n.18), is a three-sided dispute among an employee, his union and his employer. It appears from petitioner Clayton's brief on the merits that he intends to proceed by describing only that portion of the entire problem that directly and immediately affects him, without placing that aspect of the matter into the perspective afforded by the overall national labor policy. Further, the very complexity of the issues creates a tendency to give brief analysis to questions which, while not at center stage in this case, are of significance to the development of that policy generally, and should be fully treated by this Court if it becomes necessary to address them as stepping stones to its decision.

For example, petitioner Clayton asserts that the UAW's internal appeal procedures are inadequate as a matter of law because they "can neither effect his reinstatement nor restore his grievance to the arbitration process." (Brief for Petitioner Clayton (hereafter 'Pet. Br.") at 14.) Clayton then goes on quite eloquently to argue that damages may be an inadequate substitute for reinstatement in one's former position with full seniority. (*Id.,* 17-26.) Yet the question whether the Ninth Circuit's actual holding—that Clayton may continue his lawsuit against the employer, but not against the union—would adequately project whatever interest Clayton may have in reinstatement or in prospective damages is not discussed at all. For, Clayton merely asserts that the UAW's internal appeals procedure is incapable of reviving the collective agreement's grievance-arbitration procedures; the accuracy of that assertion is never explored. Similarly, Clayton contends that "[t]he UAW internal appeal cannot provide a remedy within the four-month period prescribed in 29 U.S.C. § 411(a)(4)

[§ 101(a)(4) of the Labor-Management Reporting and Disclosure Act ("LMRDA")]" (Pet. Br., 26), but gives scant attention to whether that statute is pertinent at all to the exercise of court's discretion to require, in the present context, exhaustion of particular private remedies.

This brief, consequently, is not primarily addressed to the outcome of this particular dispute. Rather, we analyze below three underlying questions which, should the Court find the need to address them, deserve more careful attention than they may otherwise receive. Those questions are:

First, whether issues concerning the breach of the statutory duty of fair representation can properly be said to arise *at all* where a union has not made a final determination as to whether to pursue grievance-arbitration procedures upon a particular employee's behalf, and the arbitrator chosen by the employer and the union to administer the collective agreement has not determined whether, if the union does pursue the grievance, the agreement provides for or precludes arbitration;

Second, whether § 101(a)(4) of the LMRDA has *any* application to this case, either affirmatively, by authorizing court-required exhaustion of a union's system for determining whether a preliminary grievance-handling decision was correct, or negatively, by limiting such authorization to a four-month period; and

Third, whether this Court's prior explication of the interaction between suits against unions for breach of the duty of fair representation and suits against employers for breach of a collective agreement under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, requires that an employee must have an ongoing breach of duty of fair representation lawsuit against his union in order to litigate his breach of contract claim against the employer.

In our view, the proper answer to each of these questions is "No."

As we show in Part I, *infra,* the Court of Appeals much too quickly bypassed the question whether petitioner Clayton in fact exhausted his *contractual grievance* remedies, as opposed to his *internal union* remedies. The exhaustion requirement of *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, would mandate as a prerequisite to a § 301 suit exhaustion of any remedies chosen by the parties to a collective bargaining agreement, including any opportunity given to one party or the other to reconsider its decision whether to go forward to the next step of the procedure. Plainly, then, in a situation in which there were no time limits in a collective agreement barring reinstitution of a grievance, or where revival of a grievance after internal union reconsideration is expressly permitted, *Maddox* itself would seem to require use of any procedures the union establishes for determining whether it will go forward with a grievance. And even if there *are* time limits in the agreement which appear to bar revival of the grievance, *Wiley* v. *Livingston,* 376 U.S. 543, would seem to establish that the question whether such time limits ought in the circumstances be waived is itself an arbitrable matter.

In Part II, *infra,* we discuss LMRDA § 101(a)(4), noting first that it appears to us to be possible to determine this case without reference to that provision. If, however, the Court does address § 101(a)(4), we submit that it should hold it inapplicable as either an affirmative grant of authority or a limitation thereupon, to deciding whether or when *courts* may, as a matter of sound judicial procedure, decline to intervene in a dispute between a member and his union unless and until any internal union remedies available have been tried. The language and history of § 101(a)(4), as well as sound principles of separation of powers and fed-

eralism, all militate in favor of reading that section in its entirety as pertaining only to union-imposed discipline. While there is a passage in *NLRB* v. *Marine Workers,* 391 U.S. 418, to the contrary, that passage was not necessary to the result in *Marine Workers* and should be disavowed if the problem becomes pertinent.

Finally, in Part III, *infra,* we address the question whether a § 301 action against an employer can be maintained where proof of breach of the duty of fair representation by the union is a pertinent issue, but the union is not being sued for damages as well or has been dismissed as a party. As we show, *Czosek* v. *O'Mara,* 397 U.S. 25, must be read to have decided this issue. For, the same factors which led this Court in that case to conclude that a union may be sued independently in a § 301—breach of duty case require that an employer can also be a lone defendant in such an action.

ARGUMENT

I

Exhaustion of Contractual Remedies

In addressing the problem here, the Court of Appeals assumed that the employee's case against the union turns on the judicial doctrine of exhaustion of *internal union* remedies (623 F.2d 563, 566) and that:

> Here, once the union withdrew its petition for a hearing on his grievance, Clayton lost any opportunity he might have had for reinstatement through the contractual grievance process. Even if Clayton had successfully appealed the withdrawal of the hearing request and the union had reversed itself and found that it should have processed his grievance, the union's public review board could do no more than award him damages for breach of its duty of fair representation. It could neither reinstate Clayton nor reinstate his

> petition and prosecute his grievance action. [*Id.* at 569.]

This approach bypasses far too quickly the threshold issue concerning the application to the instant case of the doctrine of exhaustion of *contractual remedies* stated in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650. The *Maddox* rule, its statutory base, and the limiting principles relevant here suggest that Clayton has not in fact exhausted his *contractual* remedies because he failed to appeal the union's decision to drop his grievance.

A. *Maddox* holds:

> Unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. LMRA § 203(d), 29 U.S.C. § 173(d); § 201(c), 29 U.S.C. § 171(c) (1958 ed.).
>
> A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. It would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. [379 U.S. at 693.]

Both the *Maddox* rule and § 203(d), on which that rule rests, express, in a particular context, "a 'fundamental premise' of the federal labor laws"—*viz.* "freedom of collective bargaining—'private bargaining' under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." (*Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 254). "It follows" from that premise "that the parties'

agreement primarily determines their relations * * *. If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution." (*Carbon Fuel Co.* v. *Mine Workers,* 444 U.S. 212, 219.)

To take the situation presented in *Maddox,* no federal law provided for severance pay on the permanent closing of the mine in question. (379 U.S. at 651.) Rather, the "right" to such a payment was stated in a collective agreement, and that agreement provided also for "a three-step grievance procedure to be followed by binding arbitration." *(Id.)* Thus, the agreement did not merely state certain "rights;" it also specified the procedure for vindicating those rights. The courts are required to enforce the latter portion of the contract as well as the former:

> Collective-bargaining contracts * * * generally contain procedures for the settlement of disputes through mutual discussion and arbitration. These provisions are among those which are to be enforced under § 301. Furthermore * * * [the] congressional policy [stated in § 203(d)] "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564, 566 (1960). Courts are not to usurp those functions which collective-bargaining contracts have properly "entrusted to the arbitration tribunal." *Id.,* at 569. [*Hines* v. *Anchor Motor Freight,* 424 U.S. 554, 562-563.]

Hines also restates the limit which federal labor law establishes on the exclusivity of contractual grievance settlement procedures. The Court there noted:

> Because "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individ-

> ual employee to the collective interests of all employees in a bargaining unit,'' *Vaca* v. *Sipes,* 386 U.S. 171, 182 (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, ''the responsibility and duty of fair representation.'' *Humphrey* v. *Moore, supra,* [375 U.S.] at 342. [424 U.S. at 564.]

And *Hines* recognized that:

> Claims of union breach of duty may arise during the life of a contract when individual employees claim wrongful discharge or other improper treatment at the hands of the employer. Contractual remedies, at least in their final stages controlled by union and employer, are normally provided; yet the union may refuse to utilize them or, if it does, assertedly may do so discriminatorily or in bad faith. [*Id.* at 564.]

The rule governing such claims is that:

> The union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract. [*Id.* at 567.]

B. The collective bargaining system established by federal law recognizes the variety of industrial and commercial activity in this society and of the industrial relation systems that activity creates. Congress' ''object'' therefore

> was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective

> bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. [*Porter Co.* v. *NLRB*, 397 U.S. 99, 103.]

The reliance on the parties' ability to work out solutions to their own problems adapted to their needs as they see those needs extends to solving the problem of how to process and decide contractual grievances. Section 203(d) of the LMRA endorses, without limitation, "Final adjustment [of such grievances] by a method agreed upon by the parties * * *." See, e.g., *Drivers Local Union* v. *Reis & Co.*, 372 U.S. 517, 519. Thus, for example, it is for the parties to decide the number of grievance steps, the identity of the participants at each stage, the formality of the procedures, and so on. One variation on the myriad of possibilities that has been developed is a contractual grievance settlement system providing that when frontline union officials decide not to press a grievance, that decision does not finally dispose of the grievance if the affected employee seeks review within the union according to a procedure developed by the union; only when that review affirms the initial determination is the grievance deemed to be withdrawn. This approach has several virtues.

In *Vaca* v. *Sipes, supra,* the Court noted:

> [T]he individual employee [does not have] an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. * * * In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration.

Against that background, steps that promote rational

and considered decision making by the union as to whether to press a grievance strengthens the entire system and protects employee rights. The union's position in the grievance machinery established in a collective agreement is the same as that of the NLRB's General Counsel in the administrative scheme put into effect by the NLRA. The General Counsel, as the Court noted in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, "has adopted certain procedures for processing unfair labor practice charges * * * [i]n order to structure [his] considerable power" (*id* at 139) among which is "[t]he appeals process [which] affords the General Counsel's Office in Washington some opportunity to formulate a coherent policy, and to achieve some measure of uniformity, in enforcing the labor laws." (*Id.* at 141). (See also Davis, *Discretionary Justice* (1969) at 205-206.)

Similar considerations support a union procedure for reviewing initial decisions not to proceed further with a grievance. The views of those removed from the underlying dispute and the initial decision add a dimension of reflective and disinterested appraisal not otherwise obtainable. And, particularly where the contract covers many employees or numerous units, a system of review of initial determinations furthers an ideal noted in *Vaca—viz.*, "that similar complaints will be treated consistently and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved." (386 U.S. at 191.) That end is particularly likely to be served when the reviewing authority is at a higher level of the organization and considers disputes emanating from several sources. For, the reviewing authority is then able to preceive the entire picture as it develops in a manner not possible for the participants who are actively engaged in composing that picture. Finally, of course, in light of the portion of *Hines* quoted above (stating the union's duty of

fair representation and the consequences of a breach of that duty), the interests of the employer, the union, the employee and the society are furthered by responsible union action designed to prevent such breaches, to maintain the integrity of the parties' choice of a contractual system of grievance settlement, and to preclude the necessity of employee court suits.

C. It follows from the foregoing that the employee's breach of contract claim against the employer is not ripe under *Maddox,* and his duty of fair representation claim against the union (as well as the breach of fair representation prerequisite to his breach of contract claim) are not ripe under *Vaca,* until his grievance has been finally determined against him under the contractual grievance settlement procedure. It is contrary to the policy described in the previous paragraphs for the courts to intervene before the statutory representative has determined, at the highest level at which such decisions can be made under its procedures, not to press the grievance to arbitration.[1]

Thus, where, as appears to be the case here (see, J.A. 102-103), it is open to the employee to seek a decision by higher union officials (or by a Public Review Board as the union's delegate) to proceed with the arbitration, the union has not made a final decision to reject the grievance.[2] An employee who sues prior to such decision has simply failed

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[1] The same analysis is applicable where a decision has been made at a lower level in the union's hierarchy to drop the grievance at some level prior to arbitration, but that decision is subject to reversal at a higher union level.

[2] By the same token, if the contractual grievance procedure provided that the company's final determination concerning its disposition of the grievance is at the level of the Vice President for International Relations, the employee could not sue for breach of contract while it was still open to him to receive a favorable decision from that officer.

to give the union an adequate opportunity to exercise its duty of fair representation and ought not to be heard to contend that the union has breached that duty. Moreover, as long as it is open to the union to seek arbitration, it has not been finally determined under the contractual grievance procedure that the employee has been denied his asserted contract right, so that his § 301 claim against the employer cannot be entertained under *Maddox*. In short, his court actions against the employer and the union are premature.

The foregoing analysis follows directly from, and unquestionably effectuates the policies of the Act as explicated in, *Maddox, Vaca* and *Hines*. Our point is, however, subject to the possible objection that the contractual grievance procedure may contain a time limitation for bringing cases to arbitration which the union has not met in determining on review whether to press the case to arbitration. This difficulty, of course, does not arise where the employer and the union have placed no such time limit in their agreement, or where the contractual grievance procedure expressly contemplates that it would be open to the union to demand arbitration until it has determined, at the highest level, not to do so.[3]

Where, however, the collective agreement does contain a time limit for proceeding to arbitration (or for completing some other steps which have not been accomplished prior to a final union determination not to process the grievance further), it may appear at first glance that it would be futile for the employee to seek a decision at a higher union level to press his grievance, and that his claim has indeed been finally determined against him within the contractually provided system. However, such surface appearances may be illusory. (Cf. *Maddox*, 379 U.S. at 659.)

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[3] Such, for example, is the situation under the contract between the UAW and General Motors.

If the higher union officials determine that the grievance is meritorious, they may ask the employer to waive the contractual time limit and he may choose to do so, thereby permitting the grievance to be resolved internally. In the absence of such waiver, the union may take the position that the contractual time provisions do not bar processing the grievance to and through arbitration. This is clearly a question of contract interpretation for the arbitrator under *Wiley* v. *Livingston*, 376 U.S. 543, 555-559:

> Although a party may resist arbitration once a grievance has arisen, as does Wiley here, we think it best accords with the usual purposes of an arbitration clause and with the policy behind federal labor law to regard procedural disagreements not as separate disputes but as aspects of the dispute which called the the grievance procedures into play.

Thus, even when the collective agreement imposes a definitely stated time limit, it is open to the arbitrator to decide that the parties did not intend that time limit to apply under particular circumstances. For example, it could be appropriate for an arbitrator to conclude that the contract refers to situations in which review within the union is not sought; the collective agreement must be read in conjunction with the union's internal procedure for determining whether to press a grievance, of which the parties must be presumed to have been aware, and with the national labor policy's preference for internal resolution of contractual disputes. "[T]he law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying that context." (*NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 430.) *Wiley* itself is an example in which arbitration of a timeliness issue was directed although previous steps described by the contract had not

been followed. (See 376 U.S. at 555-556. Cf. *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, holding that the courts are not to determine that the merits of a dispute in passing on its arbitrability.)

In sum, until the union has finally determined not to press the grievance, or the arbitrator has ruled against the employee, either because the grievance has been untimely processed or on the merits, the employee can still prevail under the contractual agreement's procedure. And as long as that is possible, he has not exhausted the grievance procedure as *Maddox* and its progeny require as a condition for filing a suit.

II

LMRDA Section 101(a)(4)

Section 101(a)(4) of the LMRDA, 29 U.S.C. § 411(a)(4), states:

> "*Protection of the Right to Sue.*—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof * * *."

The Court of Appeals perceived in the first proviso of this statute the source of its "[j]udicial discretion to require exhaustion." (623 F.2d at 566, n.2.) Clayton, on the

other hand, views the four-month limitation in the same proviso as an insuperable bar to requiring resort to the UAW's internal procedure: Clayton maintains that it will necessarily take more than four months for the UAW's Public Review Board, the final step in the internal procedure (if the employee so chooses), to decide the case.

A. This case should, we believe, be decided without addressing general questions concerning the scope of § 101(a)(4) at all. For, even if § 101(a)(4) does limit the ability of courts to require, as a matter of sound judicial administration, that members of private organizations must avail themselves of internal remedies before resorting to the courts, it would not, for two reasons, support Clayton's contention.

First, as discussed in Part I, *supra,* this case concerns the tripartite relationship between employers, unions and employees covered by collective agreements. Neither this Court nor any other has suggested that the right of parties to a collective agreement to establish remedies for breach of that agreement is limited to a four-month period, after which an individual employee is entitled to a judicial determination of his or her contractual rights. And, indeed, consistent with the LMRDA's focus on the relationship between unions and their members, the relevant proviso to § 101(a)(4) applies only to hearing procedures "within [a labor] organization." Contractual grievance procedures are not "within" either the union or the employing organization, even if they assign one or more steps of the procedure to one or another of the parties to the contract.

Second, Clayton, of course, did not use the UAW internal procedure at all. This being the case, he is hardly in a position to invoke the protection of the four-month limit once the court has determined to require exhaustion, at least

absent a showing that an effective remedy within that time is impossible. It is true that the time limits in the UAW's Constitution are so set up that a determination by the Public Review Board within four months is not *assured.* (Pet. Br., 27.) It is also true, however, that (a) there has been no showing that an effective remedy at a lower level is an impossibility; as discussed in Part I, *supra,* UAW action *short* of the PRB may determine to attempt reinstitution of the grievance, and that attempt may succeed; and (b) there is no ground upon which to assume that each body to whom Clayton's request for reconsideration of the decision not to go forward with the grievance is presented will take the maximum time permitted to make a determination; the process could well leave the PRB with a month or two to make a decision before the four-month period has elapsed.

B. Since § 101(a)(4) is not directly pertinent to Clayton's case on the facts, that provision and its proper construction should not be addressed. If it is addressed, however, the court should hold that as a matter of law, this provision has no pertinence to the problem whether, or for how long, *courts,* state or federal, may defer court proceedings to await a determination by an internal tribunal. *NLRB* v. *Marine Workers,* 391 U.S. 418, is not the contrary.

In *Marine Workers,* the question was whether a member of a union could be expelled from membership for filing an NLRB charge against his union without exhausting, as the union constitution required, his internal remedies. After finding that the union had violated § 8(b)(1)(A) of the NLRB by infringing upon an employee's right of "unimpeded access to the Board" (*id.* at 424), the Court was faced with deciding whether the exhaustion proviso of LMRDA § 101(a)(4) somehow excused interference with "[t]he [NLRA] policy of keeping people 'completely free

from coercion' [*Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 238] against making complaints to the Board [a freedom which] is * * * important to the functioning of the [NLRA] as an organic whole." (*Id.* at 424.)

The Court refused to read the § 101(a)(4) proviso as modifying not only the prohibition contained in § 101(a)(4) itself, but also entirely separate prohibitions upon interference with free resort to judicial or administrative remedies contained in distinct statutes and central to the policies underlying those statutes. Rather, the Court enforced the NLRA's unqualified prohibition upon union interference with NLRB access of union members despite the LMRDA's qualified permission to unions to require, on pain of discipline, up to four months of internal exhaustion. Specifically, the court held that where a "complaint or grievance *** touches a part of the public domain covered by the [NLRA], failure to resort to any intra-union grievance procedure is not ground for expulsion from a union." (*Marine Workers*, 391 U.S. at 428.) This interpretation of the appropriate interface between the two statutes had specific support in the legislative history of the later of the two acts, the LMRDA, as the Court noted. (*Id.* at 427-428.)

Presumably, *Marine Workers* would control in a case involving an analogous problem under a statute other than the NLRA. Thus, if a union tried to fine, expel or otherwise discipline a member for filing against it a charge with the Equal Employment Opportunity Commission under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, without exhausting internal remedies for four months, the union would squarely violate a provision of Title VII itself. (Title VII, § 704, 42 U.S.C. § 2000e-3.) In this circumstance, as in *Marine Workers*, we assume that the proviso to LMRDA § 101(a)(4) would not legitimate the union's vio-

lation of a completely separate prohibition from that contained in § 101(a)(4).

On the other hand, the *Marine Workers* situation is quite different from one in which the only statutory prohibition upon union discipline for resorting to a court or agency is § 101(a)(4) itself. In that circumstance, the proviso would appear on its face to apply (see subpart C *infra*), and a union *could* enforce a rule that the individual exercise his or her "right * * * to institute an action in any court, or *** administrative agency" only after exhausting "reasonable" internal union remedies for four months.[4]

There is, it is true, a passage in Justice Douglas' opinion for the Court in *Marine Workers* indicating that the proviso to § 101(a)(4) does not qualify the statutory prohibition, directed only at any "labor organization," upon interfering with members' resort to legal remedies, but instead, "install[ed] in this labor field a regime comparable to that which prevailed in other areas of law before federal courts, which often stay their hands while a litigant seeks administrative relief before the appropriate agency." *Id.* at 426. However, no question concerning court-required exhaustion, as opposed to union-imposed discipline, was before the Court. Nor were Justice Douglas' remarks concerning his belief as to what § 101(a) (4) *might* mean essential to his conclusions as to what the Section does *not* mean. For after *Marine Workers* the § 101(a)(4) proviso *would* have a perfectly sensible application if Justice Douglas' suggestion in that case as to its possible meaning were not

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[4] Section 609 of the LMRDA, 29 U.S.C. § 529, creates a separate cause of action where a union disciplines a member "for exercising any right to which he is entitled under the provisions of this Act." Since this section does not create any rights but simply incorporates those created by other sections of the LMRDA, it does not alter the qualified nature of the right created by § 101(a)(4).

adopted: As we have just demonstrated, the *Marine Workers* result comports perfectly well with the view that while § 101(a)(4) does not forbid all time-limited exhaustion requirements imposed and enforced by a union, neither does it sanction such a requirement if prohibited by another statute. Since, as we now show, Justice Douglas' suggestion is in fact contrary to the statute's language, structure and history as well as to basic principles of federalism and of separation of powers, it ought not to be followed in this case should the scope of § 101(a)(4) become pertinent.

C. The most logical conclusion to be drawn from the bare language and structure of the main sentence of § 101(a)(4) and its first proviso is that the sentences concern whether and under what circumstances unions may *discipline* members who file legal actions against their unions. Section 101(a)(4) is, of course, part of Title I of the LMRDA, the Bill of Rights for union members, which consists of various provisions prescribing what unions may and may not do in the treatment of their members. The main sentence of § 101 (a)(4) itself forbids any "labor organization" from limiting certain legal rights of its members; no prohibition is directed against public courts or agencies. As parts of a proviso, both the right to require exhaustion and the four month limitation upon that right are, logically, *exceptions* which state what the organizations to whom the previous command was directed may do despite that preceding and general restriction upon their action.

This reasoning follows the lead of the decisions of this Court. The office of a proviso is well understood. It is "to except something from the operative effect, or to qualify the generality, of the substantive enactment to *which it is attached.*" *Cox* v. *Hart*, 260 U.S. 427, 435. (Emphasis added.) *Cf. National Labor Relations Board* v. *Servette, Inc.*, 377 U.S. 46: "There is nothing in the legislative history

which suggests that the protection of the proviso [Section 8(b)(4) of the NLRA] was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress." The prohibition of Section 101(a)(4) clearly applies to *union-imposed* restrictions. It follows that the exception contained in the proviso must likewise apply to *union-imposed* restrictions. Accordingly, the authorization for a requirement that union members pursue internal remedies for four months must be an authorization for such a requirement when imposed by *unions*. The four-month limitation, in turn, qualifies that authorization.

To instead read § 101(a)(4) as limiting *courts* in their handling of suits by union members not only violates settled principles of statutory construction but, as well, creates two serious policy problems. The first of these problems relates to the separation of powers between the legislative and judicial branches of government. The construction of § 101(a)(4) suggested by petitioner Clayton would require both federal and state courts to hear a case four months after the cause of action arises, even though the legal questions might turn on complicated and arcane rules relating to the purely fraternal aspects of the association, and even though the union's internal appeal apparatus was sound and fair. In short, it would require the court to act even though the case is clearly not ripe for adjudication, so that sound principles of judicial administration and economy would dictate otherwise. If the exhaustion of remedies rule has been modified by § 101(a)(4) to allow the courts to permit only four months of exhaustion, then that section must mean that they can never under any circumstances refuse to hear a case after that period has elapsed. Such a direction from Congress

to the courts would, of course, trench on the traditional powers of the latter. "One cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of such intent would have been made." *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329.

That conclusion is buttressed by considerations of federalism. Suits against labor organizations may be filed, of course, in state as well as federal court. It is unlikely that Congress, in the LMRDA, undertook the sensitive task of regulating state court procedure in cases which may arise entirely under state law, without giving a clear indication of its intent to do so. Yet, there is no such indication in the language or legislative history of § 101(a)(4).

With this background in mind, we turn briefly to the legislative history. That history shows, first, that the § 101 (a)(4) proviso *was* in fact intended to serve the usual purpose of a proviso. That is, it is a limited *qualification* upon the prohibition contained in the main sentence, so that it permits union disciplinary action if union-imposed exhaustion requirements are not met.

The present § 101(a)(4), including the proviso, is with one exception exactly the same as § 101(a)(4) of S. 1555, 86th Cong., 1st Sess., as it passed the Senate. See 1 Legislative History of the Labor Management Reporting and Disclosure Act of 1959, p. 520 (G.P.O. 1959) (hereinafter Leg. Hist. LMRDA.) That exception is that S. 1555 allowed for six months of exhaustion while the LMRDA allows for only four months. Both Senator Goldwater and Representative Griffin critized the six-month time limit in S. 1555 on the ground that while the union rules it allowed, if observed, would ordinarily only delay access to the *courts,* it would enable a union, in effect, to bar a member from filing

charges with the *NLRB,* since that statute of limitations under the NLRA is also six months. Said Senator Goldwater:

> "If, in order to be eligible for the protection of his right to sue under this provision of the bill of rights, a union member must wait 6 months while exhausting his internal union hearing procedures, he finds that the NLRB will refuse to process his unfair labor practice charge because the Taft-Hartley Act's 6-month time limitation on the filing of charges has run out. On the other hand, if having failed to exhaust his union hearing procedures, he fails to wait the required 6 months and files his charge with the NLRB in order to escape the Taft-Hartley time limitation, he loses the protection of the right to sue provision of the bill of rights, and the union, if it wishes *may discipline him for having filed the charge.*" [105 Daily Cong. Rec. 9108 (June 8, 1959), 2 Leg. Hist. LMRDA 1280. (Emphasis added.) *See also* 105 Daily Cong. Rec. 6847 (May 7, 1959), 2 Leg. Hist. LMRDA 1270 (Sen. Goldwater).][5]

Indeed, since, as Congress was made aware (see, e.g., 105 Daily Cong. Rec. 14495 (Aug. 13, 1959), 2 Leg. Hist. LMRDA 1667 (Rep. McCormack)), the NLRB did not apply an exhaustion of remedies rule, the great congressional concern with assuring access to the Board, and the action taken based on that concern, make sense only if the proviso *does* apply to union disciplinary action in some circumstances.[6]

[5] The Landrum-Griffin bill, H.R. 8400, 86th Cong., 1st Sess., in a provision identical to Section 101(a)(4) of the LMRDA as passed, met this criticism by reducing the time period from six months to four. See 105 Daily Cong. Rec. 13089 (July 27, 1959), 2 Leg. Hist. LMRDA 1520 (Rep. Griffin). *See also* 105 Daily Cong. Rec. 14193-14194 (Aug. 11, 1959), 2 Leg. Hist. LMRDA 1566-1567 (Rep. Griffin).

[6] *Marine Workers* held that where "plainly internal affairs of the union are involved" (*id.* at 424), the NLRA would not bar union discipline for invoking the Board's aid.

Second, the legislative history, when read in light of the principle that "[i]t is the sponsors that we look to when the meaning of the statutory word is in doubt" (*Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 394),[7] makes clear that the § 101(a)(4) proviso was *not* intended to infringe upon the ability of courts to apply jurisprudential rules requiring exhaustion of private remedies. For, Senator Kennedy, the Chairman of the Conference Committee which developed the bill in its final form (*see* 105 Daily Cong. Rec. 16428 (Sept. 3, 19593, 2 Leg. Hist. LMRDA 1446) so explained to his colleagues in no uncertain terms:

> The protection of the right to sue provision originated in the Senate bill and was adopted verbatim in the Landrum-Griffin bill except that the first proviso limiting exhaustion of internal hearing procedures was changed from 6 months to 4 months. The basic intent and purpose of the provision was to insure the right of a union member to resort to the courts, administrative agencies, and legislatures without interference or frustration of that right by a labor organization. On the other hand, it was not, and is not, the purpose of the law to eliminate existing grievance procedures established by union constitutions for redress of alleged violation of their internal governing laws. *Nor is it the intent or purpose of the provision to invalidate the considerable body of State and Federal court decisions of many years standing which require, or do not require, the exhaustion of internal remedies prior to*

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[7] As Justice Douglas noted (391 U.S. at 427 & n. 9), several Members of Congress indicated on the floor of the House of Representatives that the proviso did concern the authority of courts to require exhaustion. Representatives McCormack, O'Hara, and Foley, however, were all speaking in *opposition* to the bill when they made the remarks alluded to in *Marine Workers*. "The fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Schwegmann Bros., supra*, 341 U.S. at 394.

court intervention depending upon the reasonableness of such requirements in terms of the facts and circumstances of a particular case. So long as the union member is not prevented *by his union* from restoring to the courts, the intent and purpose of the "right to sue" provision is fulfilled, and any requirements which the court may then impose in terms of pursuing reasonable remedies within the organization to redress violation of his union constitutional rights will not conflict with the statute. The doctrine of exhaustion of reasonable internal union remedies for violation of union laws is just as firmly established as the doctrine of exhausting reasonable administrative agency provisions prior to action by courts.

"*The 4-month limitation in the House bill also relates to restrictions imposed by unions rather than the rules of judicial administration or the action of Government agencies.* For example, the National Labor Relations Board is not prohibited from entertaining charges by a member against a labor organization even though 4 months has not elapsed." [105 Daily Cong. Rec. 16414 (Sept. 3, 1959) 2 Leg. Hist. LMRDA 1432. (emphasis supplied).]

As Senator Kennedy's remarks indicate, § 101(a)(4) was not "*installing* in this labor field a regime comparable to that which prevails [with regard to] . . . administrative relief." *Marine Workers*, 391 U.S. at 426. That "regime" already existed, having been developed by the courts themselves as a matter of their own governance. If § 101(a)(4) were removed as both an authorization for court exhaustion doctrines and a limitation thereon, courts would not lose the ability to give "[r]esponsible union self-government . . . a fair opportunity to function." (*Id.* at 429 (Harlan, J., concurring.) Rather, they would simply have the opportunity to determine for themselves when that "fair opportunity" was completed.

III

Separate Actions Against Employers

The Court of Appeals considered and rejected the employer's argument that there must be a unitary answer to the internal union exhaustion question for suits against the employer and suits against the union:

> Conditioning the employer's use of the internal exhaustion defense on the adequacy of internal union remedies produces an anomaly. Where the employer raises the affirmative defense of failure to exhaust the contract's dispute resolution machinery, and where the employee has failed to exhaust internal union procedures, the employer will be required to defend the union's representation of its members *** We are aware of the anomaly. But we have not been directed to any authority that would permit the employer to escape liability if the trier eventually finds that the employee did not receive the minimum representation his union owed him. [623 F.2d at 570.]

In holding that "the cases compel [this] result" (*id.* at 570), the Court below addressed an issue of some moment beyond the particular circumstances here presented. For, there are many possible situations in which similar problems could arise.

The first, of course, is that in which the injured employee simply declines to sue the union, choosing to forego any damages which may be attributable to the union's breach of its duty of fair representation. A second instance would be that in which a statute of limitations barred suit against a later-joined union, but not against the employer (*see Smart* v. *Ellis Trucking Co., Inc.*, 580 F.2d 215),[8] or in

[8] *Smart* involved a situation in which an employee amended his complaint to add a breach of duty claim against the union sometime after the lawsuit was instituted. At the present time, however, it is not even clear that the *same* statute of limitations always

which some other procedural defense (such as lack of venue or of personal jurisdiction) is available to the union but not the employer. Finally, if the employee *does* choose to sue both entities in a single lawsuit and is able to maintain that suit, the union may choose to settle before trial although the employer is determined to put on its proof.

All of these situations, of course, could arise as well in the opposite way, leaving the union to defend a § 301—breach of duty suit in a case in which the breach of contract action against the employer either was never included or has been dismissed. As this Court has explicated the relationship between the two interrelated issues in such suits, an "anomaly" precisely analogous to that perceived here could be said to arise if the union must defend itself because the employer is not a party. For,

> [T]o prevail against *either* the company or the Union, petitioners must show that their [injury] was contrary to the contract * * * [and] also carry the burden of demonstrating breach of duty by the Union. [*Hines*, 424 U.S. at 570.]

The reasons for this rule are, first, that absent breach of the fair representation duty by the union, the employee's suit against the employer is barred by any failure to exhaust contractual remedies; and, second, that absent a

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applies to both a breach of duty suit against the union and a § 301 suit against the employer; that issue is presently before this Court. *United Parcel Service, Inc.* v. *Mitchell*, No. 80-169. It is our view that any limitations period *should* be unitary, and should mirror the six month period contained in § 10(b) of the NLRA. (See Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in *United Parcel Service, supra.*) If our view were adopted in *United Parcel Service*, the statute of limitations problem here alluded to would be limited to a circumstance similar to that in *Smart*.

breach of contract by the employer, the union's breach of the fair representation duty caused the employee no injury because it did not alter the result which would otherwise have obtained. Thus, just as the Company has available to it the defense that the Union has not breached its duty of fair representation, the Union has available to it the defense that it caused no injury to the employee because there was in fact no breach of contract.

Neither of these issues can be said to be primary while the other is secondary. The duty of fair representation question is, in a suit against either party, akin to a jurisdictional question. Yet, the breach of contract issue arises first as a matter of time, and is the question upon which the right to "all or almost all" of the damages depend. (*Vaca, supra,* 386 U.S. at 198).

A union, of course, often will be uncomfortable at being placed in the position of having to prove that the employer did *not* breach the collective agreement. This is particularly true if the union did take the case to arbitration and argue that there *was* a breach. Further, any prospects for collusion which could be alleged to inhere in a suit against the employer alone could equally well be found in a suit against the union alone, particularly since the employer's potential damages, and therefore his incentive to cooperate with the plaintiff, are likely to be considerably greater than that of the union.

But, the question whether a union can be sued for breach of the duty of fair representation even though suit against the employer for breach of contract was never filed or was dismissed is not an open question. In *Czosek* v. *O'Mara,* 397 U.S. 25, the issue whether the "union defendants *** may be sued alone for breach of duty when damage to employees

had its roots in their discharge" (*Id.* at 28) was squarely addressed and decided.[9]

The Court in *Czosek* answered this question in the affirmative. Central to its analysis was the apportionment of damages rules established in *Vaca*,: "The governing principle *** is to apportion liability between the employer and the union according to the fault of each." (*Id.* at 197). Because, under this "governing principle," "judgment against [the union] can in any event be had only for those damages which flowed from their own conduct * * * union defendants will not be materially prejudiced by the possible absence of the [employer] as a codefendant at trial." (*Czosek*, 397 U.S. at 29.) [10]

Since "both the union and the employer have independently caused damage to the employees" (*id.*), the employer is in no better position than the union to "complain if separate actions are brought against it and the employer for the portion of the total damages caused by each." (*Id.*) Thus, as this Court recognized in *Vaca* (although the issue was not squarely before it):

> The wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation.

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[9] In *Vaca, supra*, the case was in fact against the union alone. (386 U.S. at 173, 197.) While the Court plainly assumed the propriety of such a lawsuit, it did not address the question directly at that time.

[10] The Court viewed as the "damages which flowed from [the union's] conduct" in a wrongful discharge—duty of fair representation case only those costs which the union's "refusal to handle the grievances added to the difficulty and expense of collecting from the employer." *Czosek*, 397 U.S. at 29.

> • • • [T]he jurisdiction of the courts is [not] destroyed by the fact that the employee, as part and parcel of his § 301 action, finds it necessary to prove [a breach of the duty of fair representation]. The court is free to determine whether the employee is barred by the actions of is union representative and, if not, to proceed with the action.

The principle that the two intertwined issues in duty of fair representation—§ 301 suits do not *demand* that all potential defendants be present in one lawsuit was reaffirmed in *Czosek* and should be reaffirmed once again in this case should the question become pertinent.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed, except that, if the theory of Part I, *supra,* is adopted, the judgment should be reversed insofar as it refused to dismiss the action against the employer.

Respectively submitted,

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